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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

First Responder Network Authority

Proposed Interpretations of Parts of the Middle Class Tax Relief and Job Creation Act of 2012

[Docket Number: 140821696-4696-01]

RIN 0660-XC012

AGENCY: First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice and request for comments.

SUMMARY: The First Responder Network Authority ("FirstNet") publishes this *Notice* to request public comment on certain proposed interpretations of its enabling legislation that will inform, among other things, forthcoming requests for proposals, interpretive rules, and network policies. With the benefit of the comments received from this *Notice*, FirstNet may proceed to implement these or other interpretations with or without further administrative procedure.

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: The public is invited to submit written comments to this *Notice*. Written comments may be submitted electronically through www.regulations.gov or by mail (to the address listed below). Comments received related to this *Notice* will be made a part of the public record and will be posted to www.regulations.gov without change. Comments should be machine readable and should not be copy-protected. Comments should include the name of the

person or organization filing the comment as well as a page number on each page of the submission. All personally identifiable information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Eli Veenendaal, First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce, 12201 Sunrise Valley Drive, M/S 243, Reston, VA 20192; 703-648-4167; or elijah.veenendaal@firstnet.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION AND BACKGROUND

The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. No. 112-96, Title VI, 126 Stat. 256 (codified at 47 U.S.C. 1401 *et seq.*)) (the "Act") established the First Responder Network Authority ("FirstNet") as an independent authority within the National Telecommunications and Information Administration ("NTIA"). The Act establishes FirstNet's duty and responsibility to take all actions necessary to ensure the building, deployment, and operation of a nationwide public safety broadband network ("NPSBN").[1]

One of FirstNet's principal first steps in carrying out this responsibility under the Act is the issuance of open, transparent, and competitive requests for proposals ("RFPs") for the purposes of building, operating, and maintaining the network. We have and will continue to seek public comments on many technical and economic aspects of these RFPs through traditional procurement processes, including requests for information ("RFIs") and potential draft RFPs,

[1] 47 U.S.C. 1426(b).

prior to issuance of final RFPs.[2]

As a newly created entity, however, we are also confronted with many complex legal issues of first impression under the Act that will have a material impact on the RFPs, responsive proposals, and our operations going forward. Generally, the Administrative Procedure Act ("APA")[3] provides the basic framework of administrative law governing agency action, including the procedural steps that must precede the effective promulgation, amendment, or repeal of a rule by a federal agency.[4] However, Section 6206(d)(2) of the Act provides that any action taken or decision made by FirstNet is exempt from the requirements of the APA.[5]

Nevertheless, although excluded from these procedural requirements, FirstNet desires to solicit public comment on, in addition to technical and economic issues, certain foundational legal issues to guide our efforts in achieving our mission. The solicitation of comments on proposed legal interpretations and related implementations is more typically performed in a notice and comment process, rather than within an RFI or RFP process, including publication in the more widely accessed *Federal Register*, rather than the vendor-focused *FedBizOpps*. In addition, although not subject to the procedural requirements of the APA, FirstNet is subject to various consultation obligations under the Act, and this notice and comment process can

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[2] The pronouns "we" or "our" throughout this *Notice* refer to "FirstNet" alone and not FirstNet, NTIA, and the U.S. Department of Commerce as a collective group.

[3] *See* 5 U.S.C. 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

[4] *See* 5 U.S.C. 551–559. The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. 551(4).

[5] 47 U.S.C. 1426(d)(2).

contribute to such consultations.[6]

Thus, in general FirstNet may pursue APA-like public notice and comment processes such as this *Notice*, and we intend to rely upon comments filed in response to this *Notice* to inform the above-referenced RFPs and our operations going forward. In addition, we may rely upon such comments to help inform any future implementations of the Act that we may undertake, such as establishing the network policies required by Section 6206(c)(1) of the Act.[7]

With respect to this *Notice*, where we have drawn a preliminary conclusion and sought comments thereon, we currently intend to issue a subsequent document indicating final interpretative determinations, taking into consideration the comments received. This subsequent document might not precede release of the above-mentioned RFPs, which will nonetheless incorporate such final interpretive determinations in light of the received comments. Further, although we may, we do not now anticipate issuing further public notices and/or opportunities for comment or reply comments on the preliminary conclusions made in this *Notice*, and thus encourage interested parties to provide comments in this proceeding.

Where we have sought comment on a matter in this *Notice* without providing a preliminary conclusion, we may issue additional notices seeking comments on any preliminary conclusions we may reach following review and consideration of the comments responding to this *Notice*. That notice of preliminary conclusions, if issued, would then be followed by notice

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[6] *See* 47 U.S.C. 1426(b)(1) ("[FirstNet] shall . . . take all actions necessary to ensure the building, deployment, and operation of the [NPSBN], in consultation with Federal, State, tribal, and local public safety entities, the Director of NIST, the Commission, and the public safety advisory committee established in section 6205(a) . . . ."). We note, however, that the specific consultations required under 47 U.S.C. 1426(c)(2)(A) must occur between FirstNet and the single officer or governmental body designated under Section 6302(d), and this *Notice* is not intended to address those consultations, which are ongoing. *See* 47 U.S.C. 1426(c)(2)(B). Comments from such designated single officer or governmental body are, of course, nevertheless welcomed in this proceeding. We expect to continue to consult directly with Federal agencies and, pursuant to its charter, with the public safety advisory committee established under 47 U.S.C. 1425(a).

[7] 47 U.S.C. 1426(c)(1).

of final determinations. However, because we may not issue such a further notice of preliminary conclusions at all or prior to releasing the above-mentioned RFPs, we again encourage interested parties to provide comments in this proceeding.

II. ISSUES

A. FirstNet Network

1. *Elements of the Network*

Section 6202(a) of the Act charges FirstNet with the duty to "ensure the establishment of a nationwide, interoperable public safety broadband network . . . based on a single, national network architecture . . . ."[8] Section 6202(b) defines the architecture of this network as initially consisting of a "core network" and a "radio access network," with specific definitions discussed below.[9] In addition, Section 6206(b) requires FirstNet to take all actions necessary to ensure the building, deployment, and operation of the network, including issuing requests for proposals for the purposes of building, operating, and maintaining the network.[10] Thus, overall, FirstNet is responsible for ensuring the core network and radio access network is built, deployed, and operated.

Under the state and local implementation provisions of Section 6302, however, a State may, subject to the application process described in 6302(e), choose to conduct its own deployment of a radio access network in such State, including issuing requests for proposals for the construction, maintenance, and operation of the radio access network within the State.[11]

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[8] 47 U.S.C. 1422(a).

[9] *See* 47 U.S.C. 1422(b).

[10] *See* 47 U.S.C. 1426(b).

[11] *See* 47 U.S.C. 1442.

Section 6302 does not provide for State deployment of a core network separate from the core network that FirstNet is charged with deploying under Sections 6202 and 6206. Section 6302(f) requires States that choose to build their own radio access network to pay any user fees associated with such State's use of "the core network."[12] The only user fees expressly defined under the Act are those FirstNet is authorized to assess and collect under Section 6208, and as mentioned above, the Act does not require any party other than FirstNet to build and operate a core network. In addition to and consistent with these statutory provisions, Sections 4.1.1 and 4.1.2 of the Interoperability Board Report[13] indicate that the FirstNet core network is the core network connected to and controlling opt-out State radio access networks. Thus, we preliminarily conclude that opt-out State radio access networks must use FirstNet's core network to provide services to public safety entities. This conclusion is also supported by the overall interoperability goal of the Act, which would, from a technical and operational perspective, be more difficult to achieve if States deployed their own, separate core networks to serve public safety entities.[14] We seek comments on this preliminary conclusion.

Section 6202(b) of the Act defines the FirstNet "core network" as providing the

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[12] 47 U.S.C. 1442(f).

[13] Section 6203 of the Act established the Technical Advisory Board for First Responder Interoperability ("Interoperability Board") and directed it to develop minimum technical requirements to ensure the interoperability of the NPSBN. 47 U.S.C. 1423. On May 22, 2012, the Interoperability Board, in accordance with the Act, submitted its recommendations to the Commission in a report. *See* Interoperability Board, *Recommended Minimum Technical Requirements to Ensure Nationwide Interoperability for the Nationwide Public Safety Broadband Network* ("Interoperability Board Report") (May 22, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021919873. On June, 21, 2012, the Commission completed its review of the Interoperability Board's final report and approved it for transmittal to FirstNet. *See* FCC Order of Transmittal, Recommendations of the Technical Advisory Board for First Responder Interoperability, PS Dkt. No. 12-74, FCC 12-68 (rel. June 21, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-68A1.pdf.

[14] We note that roaming among networks with separate core networks, potentially from different vendors, can substantially complicate the goal of a national, interoperable network. For example, features such as end-to-end QOS, priority, and preemption are controlled by several elements in the core network, and handling these features across multiple core networks would materially increase costs and complexity overall.

connectivity between the radio access network and the public Internet or PSTN.[15] Section 6202(b) further describes the parts of the "core network" to include "the national and regional data centers, and other elements and functions that may be distributed geographically . . . and provides connectivity between (i) the radio access network; and (ii) the public Internet or public switched network, or both . . . ."[16] In accordance with this provision, relevant sections of the Interoperability Board Report, and commercial standards, we define the core network as including without limitation the standard Evolved Packet Core elements under the 3rd Generation Partnership Project ("3GPP") standards (including the Serving and Packet Data Network Gateways, Mobility Management Entity, and the Policy and Charging Rules Function), device services, location services, billing functions, and all other network elements and functions other than the radio access network.

Section 6202(b) defines the "radio access network" as consisting of all cell site equipment, antennas, and backhaul equipment required to enable wireless communications with devices using the public safety broadband spectrum.[17] We propose to define the radio access network in accordance with this provision, commercial standards, and the relevant sections of the Interoperability Board Report, as consisting of the standard E-UTRAN elements (including the eNodeB).

We seek comments on our preliminary conclusions regarding the definitions of core network and radio access network above, including the delineation of elements between them and any possible ramifications that would result based on this construct with respect to the

[15] 47 U.S.C. 1422(b)(1).

[16] *Id.*

[17] 47 U.S.C. 1422(b)(2).

achievement of FirstNet's mission, particularly if a State elects to opt-out and build their own radio access network.

2. *Public Safety Entities, Secondary Users, and Other Users*

The Act clearly indicates that the NPSBN is intended primarily for use by public safety entities. Section 6101(a) of the Act generally directs the Federal Communications Commission (the "Commission") to reallocate the 700 MHz D block spectrum "for use *by public safety entities* in accordance with the provisions of this Act."[18] Section 6206(b)(2)(B)(ii) further requires that FirstNet ensure that equipment used on the NPSBN is "capable of being used by any public safety entity."[19] However, the Act also permits FirstNet to charge user fees to, and thus by direct implication serve, non-public safety entities under certain conditions.[20] We thus first propose to define below the legal scope of *all* potential *users* of the NPSBN, including both public safety entities and non-public safety users. In a later section, we will discuss the limitations imposed by the Act on the types of *services* FirstNet may offer to such users.

We note that FirstNet may, as a policy matter, decide to narrow the scope of users it actually serves relative to those it can legally serve if it determines it is reasonable and appropriate to do so in support of its mission. We also recognize that, even among the multiple user groups who are allowed to use the NPSBN, separate priority and preemption parameters will be established. In the future and following appropriate consultations, we will fully address the priority and preemptive use of and access to the NPSBN among the various user groups.

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[18] 47 U.S.C. 1411 (emphasis added).

[19] 47 U.S.C. 1426(b)(2)(B)(ii).

[20] 47 U.S.C. 1428(a)(1-3), 1442(f).

Prior to that, we address below the specific types of users that FirstNet is statutorily authorized to serve on the NPSBN.

In determining who is legally authorized to use the NPSBN it is helpful to first examine whether the Act expressly precludes any specific user group. We preliminarily conclude that the Act does not contain a list of expressly precluded users. Section 6212, discussed more fully in the next section of this *Notice*, comes closest to such a preclusion by limiting the types of services that can be provided directly to "consumers."[21] Section 6206(c)(2)(A)(vi) otherwise supports our general interpretation by requiring FirstNet to consult with regional, State, tribal, and local jurisdictions with regard to expenditures required to carry out policies on the "selection of entities seeking access to or use of" the network.[22] We preliminarily conclude that the Act grants FirstNet discretion, within the bounds of the provisions discussed below, to consider a broad range of users consistent with FirstNet's mission.

To reach this conclusion, we first look to the sections of the Act involving the imposition of fees to provide greater clarity about the users authorized to use the NPSBN. Section 6208(a)(1) permits FirstNet to charge "user or subscription" fees to "each entity, *including* any public safety entity or secondary user, that seeks access to or use of the [NPSBN]."[23] We note that this provision uses the word "including," rather than, for example, a limiting word such as "consisting" as used in Section 6202(b), which identifies the closed set of specific network components making up the NPSBN.[24]

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[21] *See* 47 U.S.C. 1432.

[22] 47 U.S.C. 1426(c)(2)(A)(vi).

[23] 47 U.S.C. 1428(a)(1) (emphasis added).

[24] 47 U.S.C. 1442(b).

Thus, although this provision explicitly identifies public safety entities and secondary users as entities for which FirstNet may charge user or subscription fees, it does appear to leave open the possibility of a group of other, unspecified entities as NPSBN users to which FirstNet may charge a network user fee, and thus presumably provide service. For example, Section 6302(f) further authorizes FirstNet to charge opt-out States "user fees" associated with use of FirstNet's core network.[25] As discussed below, we preliminarily conclude that such opt-out States could constitute either public safety entities or fall within this other, unspecified category of entities within Section 6208(a)(1) in their capacity as an entity seeking access to and use of the FirstNet core network. Similarly, Section 6208(a)(3) authorizes us to collect a fee from any entity that seeks access to or use of any network equipment or infrastructure.[26] Such entities could also possibly fall under the other category of unspecified users or, like opt-out States, be considered users of the NPSBN by virtue of our direct authority to charge a fee for access to or use of any network equipment or infrastructure. We seek comments on the preliminary conclusions above.

i. Public Safety Entities

A public safety entity is defined in Section 6001(26) of the Act as an "entity that provides public safety services."[27] We note here that the Act does not include any express language requiring a minimum amount or frequency of providing such services, but merely required that an entity provide such services, even if not full time. As is more fully discussed below, we

[25] 47 U.S.C. 1442(f).

[26] 47 U.S.C. 1428(a)(3).

[27] 47 U.S.C. 1401(26).

preliminarily conclude that an entity may offer other services in addition to a non-*de minimis* amount of public safety services and still qualify as a public safety entity.

Public safety services, in turn, are defined in the Act as having "the meaning given the term in section 337(f) of the Communications Act of 1934 [the "Communications Act"] (47 U.S.C. 337(f)); *and* (B) includes services provided by emergency response providers, as that term is defined in section 2 of the Homeland Security Act of 2002 [the "HSA"] (6 U.S.C. 101)."[28] Accordingly, we preliminarily conclude that "public safety services" are services that are either those satisfying Section 337(f) of the Communications Act or services satisfying Section 2 of the HSA. We believe an alternative interpretation requiring compliance with both definitions, rather than either definition, would not be an appropriate treatment of the word "includes" in the provision and would unduly constrain the pool of potential public safety entities that could use the network to a group smaller than either the Communications Act or the HSA definition would allow. We seek comment on this preliminary conclusion.

a. 47 U.S.C. 337(f)

> The Communications Act defines "public safety services" to mean services:
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> (A) the sole or principal purpose of which is to protect the safety of life, health or property; (B) that are provided by (i) State or local government entities, or (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.[29]

This prong of the definition of public safety services defines these services by referencing both the purpose of the services and those entities that provide them. However, the Communications Act's definition of public safety services has historically been applied not in the context of

[28] 47 U.S.C. 1401(27) (emphasis added).

[29] 47 U.S.C. 337(f)(1).

determining entities that provide services, but rather to restrict or define the particular services that can be provided over limited-use spectrum. In contrast, the Act purports to define an entity, rather than a service, as one that performs certain services.

Accordingly, the definition of public safety entity under the Act will turn on the services being provided by the entity, with the definition of such services under the Communications Act turning on both (1) the nature of the services and (2) the entity providing them. In the case of a service in general, an entity may perform different kinds of services, only *some* of which may qualify as public safety services. In the case of a public safety entity as defined in the Act, however, there is no "primary mission" restriction on the entity as there is in the Communications Act definition of public safety services. Nevertheless, when we consider just the Communications Act prong of the definition of public safety services in the Act, a public safety entity under the Act may be limited, by definition, to the entities referenced in the Communications Act definition of public safety services.

To aid our interpretation of the Act, we have examined how the Commission has interpreted this Communications Act definition. On July 21, 2011, the Commission issued an Order interpreting Section 337(f) in connection with permissible uses of the 763–768 MHz and 793–798 MHz public safety broadband spectrum, which is now a portion of the spectrum licensed to FirstNet.[30] This Order provided "guidance on the scope of permissible operations under Section 337 of the Communications Act as undertaken by state, local, and other governmental entities."[31] The Commission provided several specific examples of potential

[30] *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Fourth Report and Order, 26 FCC Rcd. 10799 (F.C.C. July 21, 2011) *(Fourth Report and Order).*

[31] *Id.*

permissible uses by personnel of governmental entities that are informative for purposes of defining "public safety entity" under the Act. These include:

1) Entities supporting airport operations when "ensuring the routine safety of airline passengers, crews, and airport personnel and property in a complex air transportation environment."[32]
2) Transportation departments in the design and maintenance of roadways, the installation and maintenance of traffic signals and signs, and other activities that affect the safety of motorists and passengers.[33]
3) City planning departments to ensure compliance with building and zoning codes intended to protect the safety of life and property.[34]
4) Entities protecting the safety of animals, homes, and city infrastructure, particularly in crisis situations.[35]

We give deference to the conclusions reached by the Commission in its interpretation of Section 337(f)(1) to inform our interpretation of "public safety services" as defined in the Act. Thus, we preliminarily conclude that entities providing the services described in the Commission's Order, above, would qualify as public safety entities for purposes of the Act. We seek comment on this preliminary conclusion. We also seek comment on other entities and services that should so qualify.

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[32] *Id.* at 10808.

[33] *See id.*

[34] *See id*. at 10809.

[35] *See id*. at 10808.

Section 337(f)(1)(B)(ii) also provides that public safety services can be performed "by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services."[36] In its Order, the Commission did not address services performed by non-governmental organizations. We preliminarily conclude that the Commission's description with respect to services provided by governmental entities should equally apply to services provided by non-governmental entities as contemplated by Section 337(f)(1). We thus seek comments on the types of non-governmental organizations that, were they to provide the services the Commission addressed with respect to governmental entities, would qualify under Section 337(f) of the Communications Act as providing public safety services. We also seek comments on other non-governmental organizations and services that should so qualify.

In order to understand which non-governmental entities under Section 337 would qualify as public safety entities, one must first identify the types of governmental entities whose primary mission is the provision of public safety services, as these entities can, in turn, authorize non-governmental organizations to provide public safety services under Section 337(f)(1)(b)(ii). Section 337(f) of the Communications Act refers to such entities as "a governmental entity whose primary mission is the provision of [public safety] services."[37] We seek comments on which governmental entities may authorize non-governmental organizations to provide public safety services based on this "primary mission" limitation. For example, we seek comments on whether state utility commissions, health departments, and police and fire agencies qualify as such entities. We also seek comments on what other governmental entities would so qualify.

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[36] 47 U.S.C. 337(f)(1)(b)(ii).

[37] *Id.*

b. HSA Section 2

Section 6001(27) of the Act states that public safety services are not only services defined in Section 337 of the Communications Act, but also are services provided by "emergency response providers" as that term is defined by HSA Section 2.[38] "Emergency response providers" include "Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities."[39]

Thus, under the Act, a public safety entity is also an entity performing the services performed by "emergency response providers." The inclusion in the Act of the HSA definition arguably expands the list of potential public safety services beyond that provided in the definition in Section 337 of the Communications Act, in that the HSA definition does not include a "primary mission" limitation and specifically identifies "personnel" in addition to agencies and authorities as emergency response providers. The HSA definition thus raises the question as to whether a public safety "entity" under the Act can be a person in addition to an organization.[40] While Section 337(f) of the Communications Act indicates that public safety services are services provided only by governmental entities and nongovernmental organizations, the Act's inclusion of services provided by emergency response providers per HSA Section 2 could reasonably be interpreted to mean that personnel should be considered public safety entities

[38] *See* 47 U.S.C. 1401(27)(B).

[39] 6 U.S.C. 101(6).

[40] We note that the Supreme Court has interpreted the word 'entity' to typically refer to an organization, rather than an individual. *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010). However, the Court noted that the analysis of whether an entity should include an individual must be made by reference to the underlying statutory definition, terms and components. In *Samantar*, the Court noted in reaching its conclusion that the statutory terms of the Foreign Sovereign Immunities Act of 1976, as drafted, would have to be awkwardly applied in order to include individuals within the meaning of entity in that context. *See id.*

under the Act when providing services that would otherwise be considered public safety services. Thus, we preliminarily conclude individuals may fall within the definition of "public safety entity" so long as they are serving in their official capacity.[41] Given this preliminary conclusion, both volunteer firefighters and the fire departments for which they serve, for example, would qualify as a public safety entity. FirstNet seeks comment on this preliminary conclusion.

In reaching this preliminary conclusion, we also note that while the definition of public safety services under Section 337(f) of the Communications Act is limited to those services "the sole or principal purpose of which is to protect the safety of life, health, or property," such a limitation is not present in the HSA definition, or in the definition of public safety entity in the Act itself. Thus, when read in totality, the Act does not limit the definition of public safety entity to those entities that solely, or even primarily, provide such services, given the HSA Section 2 component of the definition. Congress limited the definition of public safety entity in the Communications Act, but, given the incorporation of HSA Section 2 into the Act, we preliminarily conclude that Congress imposed no such limitation here. As a result, the Act does not appear to require any minimum amount of time that an entity must provide public safety services in order to qualify as a public safety entity under the Act. We thus preliminarily conclude that, so long as an entity performs a non-*de minimis* amount of public safety services, even if it provides other services, it will qualify as a public safety entity under the Act.[42]

Finally, HSA Section 2 indicates that "emergency response providers" include not only "Federal, State, and local governmental and nongovernmental emergency public safety, fire, law

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[41] 47 U.S.C. 337(f)(1)(A).

[42] This does not mean that as a policy matter, rather than a legal matter, FirstNet may not further restrict an entity's use of the network, for example, to only those times it is providing public safety services or restrict access to the network to only those entities who have public safety as a primary mission.

enforcement, emergency response, emergency medical (including hospital emergency facilities) . . . personnel, agencies, and authorities" but also "*related* personnel, agencies, and authorities."[43] We preliminarily interpret the term "related personnel, agencies, and authorities" as personnel, agencies, and authorities providing support to public safety entities in their mission as it would further the public safety goals of the Act to facilitate interoperable communications between public safety entities and the personnel, agencies, and authorities supporting them. Therefore, we preliminarily conclude that the Act identifies public safety entities under the HSA Section 2 prong as:

(1) Any Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, and emergency medical (including hospital emergency facilities) personnel, agencies, and authorities; and

(2) Personnel, agencies, and authorities providing support to Federal, State, and local governmental and nongovernmental emergency public safety, fire, law enforcement, emergency response, emergency medical (including hospital emergency facilities) personnel, agencies, and authorities.

We seek comments on these preliminary conclusions and on which specific personnel, agencies, and authorities might then qualify as "related" or providing support to the Federal, State, and local governmental and nongovernmental personnel, agencies, and authorities listed in the HSA definition.

ii. Secondary Users

As discussed above, the term "secondary user" is also expressly used in the Act to describe a particular category of FirstNet user. Although there is no express definition of

[43] 6 U.S.C. 101(6) (emphasis added).

secondary user in the Act, Section 6208(a)(2), which addresses covered leasing agreements with "secondary users," could be interpreted to implicitly define a secondary user as one that "access[es] . . . network capacity on a secondary basis," or, as Section 6208(a)(2) goes on to provide, "access[es] . . . network capacity on a secondary basis *for non-public safety services*."[44]

In the context of the Act, the "secondary basis" is presumably "secondary" to use by public safety entities, which would be considered primary users. Because FirstNet believes certain public safety users will themselves ultimately be subject to prioritization and/or preemption by other public safety users, FirstNet does not believe the "secondary basis" referenced in the Act can be defined solely as those users subject to such prioritization or preemption. Indeed, certain public safety entities may, at times, be performing preemptable public safety services or preemptable non-public safety services.

The references to secondary users provided in Sections 6212 and 6302(g) also do not appear to be conclusive as to whether secondary users include users other than those that enter into covered leasing agreements, which is the only explicit arrangement identified within the Act describing a secondary use of the NPSBN.[45] Section 6208(a)(2) sets out very specific criteria for covered leasing agreements with secondary users.[46] The Act defines a covered leasing agreement as a written agreement resulting from a public-private arrangement to construct, manage, and operate the public safety broadband network between FirstNet and a secondary user to permit: "(1) access to network capacity on a secondary basis for non-public safety services; and (2) the spectrum allocated to such entity to be used for commercial transmissions along the

[44] 47 U.S.C. 1428(a)(2) (emphasis added).

[45] 47 U.S.C. 1432, 1442(g).

[46] 47 U.S.C. 1428(a)(2).

dark fiber of the long-haul network of such entity."[47] Given the specificity with which Congress set out conditions for non-public safety use of network capacity, we seek comments on a preliminary definition of secondary user as a user that accesses network capacity on a secondary basis for its own, or the provision of, non-public safety services *only*. We also seek comments on whether, notwithstanding the language in Section 6208(a)(1) permitting FirstNet to charge network user fees to secondary users, the definition should be constrained further to limit secondary users to those entering into covered leasing agreements.[48]

A definition limiting secondary users to non-public safety use would be consistent with our preliminary approach, discussed in the previous section, regarding the definition of public safety user, whereby the definition of that term includes any entity that performs public safety services at any time in any non-*de minimis* amount. Thus, for example, an electric utility could come within the definition of public safety entity (and could also be a party to a covered leasing agreement), but FirstNet policies and procedures, along with local public safety control of prioritization and preemption, would likely regulate its use of the NPSBN.

We also note that, in addition to the fee for leasing network capacity under a covered leasing agreement which can be charged under Section 6208(a)(2), the Act, under section 6208(a)(1), permits FirstNet to charge secondary users a network user fee for using or accessing the NPSBN.[49] Although in and of itself this provision would not necessarily require a change to the definition of secondary user proposed above, we seek comments on whether the inclusion of the term in subsection (a)(1) should affect the definition of secondary user.

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[47] *Id.*

[48] 47 U.S.C. 1428(a)(1).

[49] 47 U.S.C. 1428(a)(1).

iii. Entities Other than Public Safety Entities and Secondary Users Seeking Access to or Use of the NPSBN

As discussed above, we preliminarily conclude that Section 6208(a)(1) permits FirstNet to charge a fee to a category of user beyond public safety entities and secondary users. We seek comments on which potential users could fall into this category.[50] In addition, we seek comments on whether users identified in Section 6208(a)(3) (those seeking access to or use of any equipment or infrastructure constructed or otherwise owned by FirstNet) and Section 6302(f) (opt-out States seeking use of the core network) fall within this third category of user, constitute their own unique category of users, or fall within the definition of public safety entity or secondary user for purposes of Section 6208(a)(1).[51]

3. *Services*

As previously discussed, FirstNet is permitted to assess or collect certain fees related to the services that it offers. Sections 6208 and 6302 specifically permit us to assess and collect: (1) network user fees from users seeking access to or use of the NPSBN; (2) fees associated with covered leasing agreements; (3) fees related to the leasing of our network equipment and infrastructure; and (4) user fees from opt-out States that seek use of elements of our core network.[52] Section 6212(a), however, specifies that FirstNet "shall not offer, provide, or market commercial telecommunications or information services directly to consumers."[53]

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[50] *Id.* We note that Section 6212 of the Act, discussed more fully in the section of this *Notice* on Services below, places limitations on the services that we can provide to this third category of user.

[51] 47 U.S.C. 1428(a)(3), 1422(f), 1428(a)(1).

[52] 47 U.S.C. 1428, 1442.

[53] 47 U.S.C. 1432(a).

The Act does not define the word "consumer" or indicate whether the word is limited to individuals or includes organizations and businesses. In contrast, the Act does provide a specific, multi-pronged definition of public safety entity, as noted above. As a result of this contrast, we preliminarily conclude that regardless how "consumer" is defined, Section 6212 was not intended to limit potential types of public safety entities that may use or access the NPSBN for commercial telecommunications or information services.

In addition, under the rule of construction outlined in subsection 6212(b), nothing in Section 6212 is intended to prohibit FirstNet from entering into covered leasing agreements with secondary users, and thus we preliminarily conclude that Section 6212 at the very least does not act as a limitation on secondary users in the context of covered leasing agreements. We also preliminarily conclude that, given the definition of secondary user discussed above, Section 6212 was not intended to limit the pool of secondary users seeking access to or use of the network on a secondary basis. We seek comments on these preliminary conclusions.

Thus, we preliminarily conclude that a "consumer" under the Act is neither a public safety entity nor a secondary user. Further, given the express authorizations in Section 6302(f) for FirstNet to impose user fees on opt-out States, and in Section 6208(a)(3) to impose lease fees on entities that seek access to or use of equipment or infrastructure, we also preliminarily conclude that such States and entities are not intended to qualify as a consumer (which would otherwise disqualify them as a user subject to fee assessments) when seeking access to or use of the core network, and equipment and infrastructure, respectively. We also seek comments on the kinds of services that this provision is intended to preclude FirstNet from otherwise offering and the scope of the limitations imposed by the provision. For example, we note that we are expressly authorized to enter into covered leasing agreements that would presumably permit the

secondary user involved to provide commercial services, including potentially telecommunications or information services, directly to consumers.[54] Finally, we seek comment on whether this provision implicitly outlines additional services that FirstNet may offer.

For purposes of interpreting the Act with respect to FirstNet's potential service offerings,[55] we note that the Act also provides guidance concerning the services that may be offered by a State that chooses to build its own radio access network. Specifically, Section 6302(g)(1) precludes opt-out States from "provid[ing] commercial service to consumers or offer[ing] wholesale leasing capacity of the network within the State except directly through public-private partnerships for construction, maintenance, operation, and improvement of the network within the State."[56]

FirstNet interprets Section 6302(g)(1) to mean that States cannot offer commercial services to consumers and can only lease network capacity through a public-private partnership for the purposes of in-state construction, maintenance, operation and improvement. We seek comment on this preliminary conclusion.

B. Requests for Proposals

1. *Requests for Proposals Process*

Section 6206(b)(1)(B) requires FirstNet to issue "open, transparent, and competitive" RFPs.[57] The procedural requirements for issuing such RFPs are not defined in the Act itself.

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[54] *See* 47 U.S.C. 1428(a)(2)(B).

[55] We may address the interpretation of opt-out related provisions and process in subsequent notices or rulemakings.

[56] 47 U.S.C. 1442(g)(1).

[57] 47 U.S.C. 1426(b)(1)(B).

FirstNet, however, is not expressly excluded from the applicability of the Federal Acquisition Regulation ("FAR"), codified in 48 CFR Parts 1–99. The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. Assuming application of the FAR, we preliminarily conclude that in complying with the FAR in such instances, FirstNet will satisfy the requirements of Section 6206(b)(1)(B). The FAR provides that "the Federal Acquisition System will . . . promote competition . . . [and] conduct business with integrity, fairness, and openness."[58] We believe the standards established in the FAR that promote a competitive, fair, and open process for acquiring goods and services fall within the "open, transparent, and competitive" standard of Section 6206(b)(1)(B). We seek comments on this preliminary conclusion.

We also seek comments more generally on the appropriate interpretation of the "open, transparent, and competitive" standard of Section 6206(b)(1)(B) in this context, including how that standard should be interpreted in light of the Act's use of a "fair, transparent, and objective" standard in Section 6205(b)(1).[59]

2. *Minimum Technical Requirements*

Section 6206(b)(1)(B) requires FirstNet to issue RFPs for the purposes of building, operating, and maintaining the network that use, *without materially changing*, the minimum technical requirements developed by the Interoperability Board.[60] We interpret this provision to permit FirstNet to make non-material changes or additions/subtractions to the minimal technical

[58] 48 CFR 1.102, 2.101.

[59] *See* 47 U.S.C. 1425(b)(1) (describing the standard FirstNet must follow when selecting agents, consultants, or experts).

[60] 47 U.S.C. 1426(b)(1)(B); 47 U.S.C. 1423.

requirements developed by the Interoperability Board.[61] We seek comments on how to delineate such non-material changes from those that are material. In addition, we seek comments on how to reconcile this provision with the requirements in Sections 6202(b) and 6206(c)(4) regarding FirstNet's obligations to accommodate advancements in technology.[62]

3. *Defining the Term "Rural"*

Section 6206(b)(3) directs that FirstNet "shall require deployment phases with substantial *rural* coverage milestones as part of each phase of the construction and deployment of the network . . . [and] utilize cost-effective opportunities to speed deployment in *rural* areas."[63] Additionally, Section 6206(c)(1)(A)(i) states, in relevant part, that FirstNet "shall develop . . . requests for proposals with appropriate . . . timetables for construction, including by taking into consideration the time needed to build out to *rural* areas."[64] Finally, Section 6206(c)(1)(A)(ii) of the Act explains that FirstNet "shall develop . . . requests for proposals with appropriate . . . coverage areas, including coverage in *rural* and nonurban areas."[65]

Although the Act does not define the term "rural," we believe we must define this term to fulfill our duties with regard to the important rural coverage requirements in the Act.[66]

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[61] Interoperability Board Report, *supra* n. 10.

[62] *See* 47 U.S.C. 1422(b), 1426(c)(4). Note that the Interoperability Board Report states that "[g]iven that technology evolves rapidly, the network components and associated interfaces identified in the [Interoperability Board Report] …. are also expected to evolve over time. As such, these aspects of the present document are intended to represent a state-of-the-art snapshot at the time of writing. In this context, the standards, functions, and interfaces referenced in the present document are intended to prescribe statements of intent. Variations or substitutions are expected to accommodate technological evolution consistent with the evolution of 3GPP and other applicable standards." Interoperability Board Report at 27.

[63] 47 U.S.C. 1426(b)(3) (emphasis added).

[64] 47 U.S.C. 1426(c)(1)(A)(i) (emphasis added).

[65] 47 U.S.C. 1426(c)(1)(A)(ii) (emphasis added).

[66] We appreciate the position the Commission has taken in this regard, and we are committed to fulfill our duties in a

Several sources define the term "rural," but we believe, for example, the Rural Electrification Act is a reasonable definition to use under the Act and may further the goals of the Act for several reasons. First, we believe the definition may be sufficiently precise and granular to guide potential vendors and FirstNet and ensure due consideration of such areas. Secondly, the Rural Electrification Act's definition of "rural area" is widely known and familiar to rural telecommunications providers, rural communities, and other stakeholders that will be impacted by FirstNet's mandate to carefully consider rural areas. Adoption of this definition would obviate the need for FirstNet to take additional, time-consuming steps to educate itself and the stakeholder community on the parameters of a novel or less familiar definition of "rural" or "rural area." Finally, the USDA bases its definition of "rural area" upon the definition in the Rural Electrification Act for purposes of implementing its Rural Broadband Access Loan and Loan Guarantee Program. This USDA program funds the costs of construction, improvement, and acquisition of facilities and equipment to provide broadband service to eligible rural areas, and thus we believe the definition may be suitable for our related purposes.[67] Accordingly, we seek comments on using this interpretation.[68]

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way that will meet these rural coverage requirements. *See* Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012 et al., PS Docket 12-94 et al., Notice of Proposed Rulemaking, 28 FCC Rcd 2715, 2728-29 ¶ 46 (2013) (Band 14 NPRM) (noting that, "We do not believe the Commission should specify rural milestones as a condition of FirstNet's license at this time. Rather, we recognize that at this early stage, the success of FirstNet requires flexibility with respect to deployment and planning, including deployment in rural areas. Moreover, FirstNet has an independent legal obligation under the Act to develop requests for proposals with appropriate timetables for construction, taking into account the time needed to build out in rural areas, and coverage areas, including coverage in rural and nonurban areas. In addition, in light of the Congressional oversight that will be exercised over FirstNet and its other transparency, reporting and consultation obligations, we do not believe it is necessary for the Commission to set specific benchmarks in this regard in these rules.").

[67] *See* About the Farm Bill Loan Program, USDA, *available at* http://www.rurdev.usda.gov/utp_farmbill.html (last visited May 27, 2014).

[68] We also considered similar definitions of "rural" and "rural area" utilized by other federal sources, including the U.S. Bureau of the Census, Office of Management and Budget (OMB), and the Commission.

Therefore, we preliminarily conclude that we should define "rural" as having the same meaning as "rural area" in Section 601(b)(3) of the Rural Electrification Act of 1936, as amended ("Rural Electrification Act").[69] Section 601(b)(3) of the Rural Electrification Act provides that "[t]he term 'rural area' means any area other than—(i) an area described in clause (i) or (ii) of Section 1991(a)(13)(A) of this title [section 343(a)(13)(A) of the Consolidated Farm and Rural Development Act]; and (ii) a city, town, or incorporated area that has a population of greater than 20,000 inhabitants."[70] In turn, the relevant portion of Section 343(a)(13)(A) of the Consolidated Farm and Rural Development Act explains that the "terms 'rural' and 'rural area' mean any area other than—(i) a city or town that has a population of greater than 50,000 inhabitants; and (ii) any urbanized area contiguous and adjacent to a city or town described in clause (i)."[71] Taken collectively, the Rural Electrification Act defines the term "rural area" as a city, town, or incorporated area that has a population of less than 20,000 inhabitants and is not adjacent and contiguous to an urbanized area that has a population of greater than 50,000 inhabitants. We also seek comments on whether the adjacency prong of the definition will pose any difficulties in applying the definition under the Act.

Further, FirstNet intends to use the proposed definition of "rural" for purposes of implementing the "substantial rural coverage milestones" as set forth in Section 6206(b)(3). We seek comments on how to interpret the terms "substantial rural coverage milestones" and how to implement this requirement. For example, we seek comments regarding whether the terms "substantial rural coverage" should be defined only in terms of geographic coverage, or whether

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[69] 7 U.S.C. 950bb(b)(3), *amended by* the Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649.

[70] *Id.*

[71] 7 U.S.C. 1991(a)(13)(A), *amended by* the Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649.

other factors, such as population or the frequency of first responder activity in an area, should be included. In addition, we seek comments on whether we should define a separate term for a frontier or wilderness area that would bound the term rural in connection with provisions of the Act. For example, we seek comment on whether a population density below a five person per square mile or lower standard should be considered frontier, rather than rural, for purposes of the Act.

Finally, Section 6206(c)(1)(A)(ii), as discussed above, explains that FirstNet "shall develop . . . requests for proposals with appropriate . . . coverage areas, including coverage in rural and *nonurban areas*."[72] We seek comments on the distinction between the terms rural and nonurban areas and how to define the term "nonurban" under the Act.

4. *Existing Infrastructure*

The Act encourages FirstNet to consider leveraging existing infrastructure when "economically desirable."[73] Section 6206(b)(1)(C) of the Act requires FirstNet in issuing RFPs to "encourag[e] that such requests leverage, to the maximum extent economically desirable, existing commercial wireless infrastructure to speed deployment of the network."[74] Section 6206(b)(3), which addresses rural coverage and issuing RFPs, directs that "[t]o the maximum extent economically desirable, such proposals shall include partnerships with existing commercial mobile providers to utilize cost-effective opportunities to speed deployments in rural areas."[75] Section 6206(c)(3) additionally requires that "[i]n carrying out the requirements under

[72] 47 U.S.C. 1426(c)(1)(A)(ii) (emphasis added).

[73] *See* 47 U.S.C. 1426(b)(1)(C), (b)(3), (c)(3).

[74] 47 U.S.C. 1426(b)(1)(C).

[75] 47 U.S.C. 1426(b)(3).

subsection (b), the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing (A) commercial or other communications infrastructure; and (B) Federal, State, tribal, or local infrastructure." [76]

Section 6206(b)(1)(C) appears to relate to issuing RFPs referenced in 6206(b)(1)(B) and requires FirstNet to "*encourag*[*e*] that such requests leverage, to the maximum extent economically desirable," existing infrastructure.[77] The use of the term "encourage," however, implies that FirstNet may not be in direct control of these requests. Alternatively, this provision could be intended to require FirstNet to encourage the *proposals* provided in response to FirstNet's requests to leverage existing infrastructure. Because the "requests" referenced in subsection (b)(1)(C) appear to be those required of FirstNet in subsection (b)(1)(B), we preliminarily conclude that subsection (b)(1)(C) is intended to require FirstNet to encourage, through its requests, that responsive *proposals* leverage existing infrastructure in accordance with the provision. We seek comments on this preliminary conclusion.

Section 6206(b)(3) states that with regard to FirstNet's issuing requests for proposals, "such *proposals* shall include partnerships with existing commercial mobile providers" to the maximum extent economically desirable to utilize cost-effective opportunities to speed deployment in rural areas.[78] Unlike subsection (b)(1)(C), this provision addresses "proposals," but does so without directly requiring FirstNet to act in some way. We nevertheless preliminarily interpret this provision as requiring FirstNet to include in its requests that such proposals leverage such partnerships where economically desirable. We seek comments on this

[76] 47 U.S.C. 1426(c)(3).

[77] 47 U.S.C. 1426(b)(1)(C) (emphasis added).

[78] 47 U.S.C. 1426(b)(3) (emphasis added).

preliminary conclusion, and also on whether FirstNet or the supplier responding to a FirstNet request is intended to make the actual economic desirability assessment under the provision. We preliminarily conclude that FirstNet is to make that determination, but could do so through, for example, requiring and evaluating competitive proposals from carriers with facilities in rural areas. We also seek comment on whether FirstNet or a supplier responding to a FirstNet request or both are required to enter into the referenced partnerships, and the nature of such partnerships.

Section 6206(c)(3) states that FirstNet, in carrying out the requirements of subsection (b), which include, but are not limited to, issuing RFPs, "shall *enter into agreements* to utilize, to the maximum extent economically desirable" certain existing infrastructure.[79] Thus, unlike the provisions discussed above, this provision expressly references neither requests nor proposals.

We note, however, that, as discussed above in this *Notice*, FirstNet is not expressly excluded from the applicability of the FAR, and thus when FirstNet itself enters into agreements to utilize the infrastructure described in Section 6206(c)(3), such agreements would likely be subject to the competitive processes of the FAR. FirstNet could also enter into an agreement, via such competitive process, with a private sector entity, which in turn contracts for use of State, tribal, or local infrastructure (whether or not through a competitive process). We seek comments on this interpretation.

Each of these sections, as stated above, requires FirstNet to leverage existing infrastructure to the extent it is "economically desirable." We seek comments on an appropriate definition of and approach to assessing what is "economically desirable," and the factors that should be considered, and by whom, in each of the sections imposing the standard. For example, in weighing economic desirability with respect to the speed of rural deployment, we seek

[79] 47 U.S.C. 1426(c)(3) (emphasis added).

comments on how to balance costs with speed.

In addition, we seek comments on the distinctions between the various types of existing infrastructure referenced in the three sections: commercial wireless infrastructure; commercial mobile providers; commercial infrastructure; other communications infrastructure; and Federal, State, tribal, or local infrastructure. For example, we seek comments on whether the term "commercial mobile provider" should exclude resellers or other non-facilities-based providers. Finally, we seek comments on how to factor in the transaction costs of collecting, analyzing, establishing terms and conditions for, and potentially leveraging the millions of "pieces" of infrastructure covered by the literal terms of the Act into our assessment of "economic desirability." For example, we seek comments on the extent to which such assessments of economic desirability are simply embedded in a competitive RFP process.

C. Fees

Section 6208(a) authorizes FirstNet to assess and collect three sets of fees notwithstanding Section 337 of the Communications Act.[80] We first seek comments on whether the list of fees in Section 6208(a), which we interpret below to also include the fee for core network use from Section 6302(f), are exclusive and thus the only fees FirstNet may assess and collect, at least under the authority of the Act.[81]

User Fees

Sections 6208(a)(1) and 6302(f) provide the authority and describe the circumstances under which FirstNet may assess and collect network user fees for access to and use of the

[80] 47 U.S.C. 1428(a).

[81] *Id.*

NPSBN.[82] FirstNet interprets the network user fees described in Section 6302(f) as being a specifically authorized subset of fees under Section 6208(a)(1) for "use of" the core network. We believe user fees authorized by Section 6208(a)(1) are distinct from covered leasing fees authorized by 6208(a)(2) and lease fees related to network equipment and infrastructure authorized by 6208(a)(3), which are discussed separately in the sections below. Thus, FirstNet initially concludes that each of the fees authorized by the Act may be assessed individually, and cumulatively as applicable, and we seek comments on this preliminary conclusion, and on whether FirstNet has authority to impose fees under other authorities.

i. Network User Fees

As previously discussed, Section 6208(a)(1) of the Act authorizes FirstNet to assess and collect a network user or subscription fee from each entity, including public safety entities and secondary users, that seeks access to or use of the NPSBN.[83] Thus, the Act contemplates that a network user fee could be collected from, at minimum, a public safety user or a secondary user. As previously discussed in this *Notice*, however, use of the term "including" rather than "consisting" when describing the scope of entities that may be charged a network user fee indicates that this group is not limited to only public safety entities or secondary users, but could potentially include other entities. Thus, we preliminarily conclude that FirstNet may charge a user fee to any eligible customer, including secondary users who may have already entered into a covered leasing agreement with FirstNet, and seek comments on this preliminary interpretation. In addition, we seek comments on the difference between the terms "access to" and "use of" the

[82] *See* 47 U.S.C. 1428(a); *See also* 47 U.S.C. 1442(f).

[83] 47 U.S.C. 1428(a)(1).

NPSBN in this section, including for example, whether the term "access to" would include access to databases without use of other network infrastructure.

ii. State Core Network User Fees

Section 6302(f) requires that a State choosing to build its own radio access network rather than participating in the FirstNet proposed network for that State, must pay any user fees associated with state use of elements of the core network.[84] The Act states that this fee applies specifically to the use of the core network by an opt-out State, and therefore we preliminarily conclude that it is separate and distinct from any other fees authorized by the Act. We seek comments on this preliminary conclusion.

2. *Lease Fees Related to Network Capacity and Covered Leasing Agreements*

In addition to user fees, FirstNet is able to charge fees for secondary use of network capacity. Section 6208(a)(2) provides for "lease fees" resulting from a public-private arrangement between FirstNet and a secondary user, which permits access to network capacity on a secondary basis for non-public safety services, including through "spectrum allocated to such" secondary user.[85] This public-private arrangement is termed a covered leasing agreement ("CLA") under the Act.

With regard to the specific definition of a CLA, we first note that the Act contemplates a "public-private arrangement," and thus preliminarily conclude that the arrangement must be between FirstNet and a "private" entity, with that entity being the "secondary user" provided in the preamble to Section 6208(a)(2)(B).[86]

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[84] 47 U.S.C. 1442(f).

[85] *See* 47 U.S.C. 1428(a)(2).

[86] 47 U.S.C. 1428(a)(2)(B).

The "arrangement" described in Section 6208(a)(2)(B) is one "to construct, manage, and operate the [NSPBN]."[87] The provision does not specify whether either party must perform all or a part of the constructing, managing, and operating under the arrangement. We thus preliminarily conclude that the arrangement does not require a secondary user to "construct, manage, and operate" the entire FirstNet network, either from a coverage perspective or exclusively within a specific location. Thus, for example, one secondary user could construct, manage, and operate the FirstNet network in several states, and another secondary user could do so in several other states. Similarly, a secondary user could construct, manage, and operate a portion of the network in Akron, Ohio and at the same time FirstNet or other secondary users could be constructing, managing, and operating elements of the network in Akron in conjunction with the first secondary user. And thus, we preliminarily conclude that it is theoretically possible for multiple CLA lessees to coexist and utilize FirstNet spectrum in a particular geographic area.

Therefore, FirstNet's preliminary conclusion is that there is no minimum amount, other than a *de minimis* amount, of constructing, managing, and operating that a CLA lessee must do in order to satisfy the definition. We believe this interpretation provides us with the ability to leverage our excess network capacity to the maximum extent the market will bear, ultimately benefitting public safety by helping us achieve additional efficiencies of scale and increasing revenues for further investment in the network. Any alternative interpretation requiring more than this would artificially constrain the potential pool of purchasers of excess capacity, such as to those who could partner with FirstNet only on a national basis, potentially constraining additional funding. We also preliminarily conclude that if the highest value is created by leveraging a partner on a national basis, this portion of the definition of CLA would not constrain

[87] *Id.*

FirstNet in entering into such an arrangement. We seek comments on these preliminary conclusions, including on whether a secondary user is required to even perform a *de minimis* amount of constructing, managing, and operating, as discussed above, beyond paying lease fees.

For the same reasons as stated above, we preliminarily conclude that a secondary user is not required to perform all three functions of constructing, managing, and operating a portion of the network, so long as one of the three is performed as part of the CLA. For example, a secondary user could agree to construct a radio access network in a particular location, and FirstNet could manage and operate that radio access network, assuming the other elements of the definition were satisfied.

We preliminarily conclude that use of the word "permit" in the definition of CLA indicates that an absolute requirement, such as through use of the term "requires," is not contemplated. Thus, we preliminarily conclude that the technical architecture of a CLA would, at a minimum, have to *allow* use as described in Section 6208(a)(2)(B)(i) and (B)(ii). For example, with respect to (B)(ii) and as discussed more fully below, local traffic of a secondary user not requiring long-haul transmission could be communicated locally without satisfying (B)(ii), and without violating the definition of a CLA overall.

We also preliminarily conclude that the reference to "network capacity" in item (B)(i) of the definition of CLA is a generic statement referring to the combination of spectrum and network elements, as defined by the Act and discussed in this *Notice*, which could include the core network as well as the radio access network of either FirstNet alone or that of the secondary user under a CLA whereby the core and radio access network are used for serving both FirstNet public safety entities and the secondary user's commercial customers.

Section 6208(a)(2)(B)(i) permits private entities that enter into CLAs with FirstNet

access to such network capacity "on a secondary basis for non-public safety services."[88] FirstNet interprets the term "secondary basis" to mean that the network capacity will be available to the secondary user unless it is needed for public safety services in accordance with the discussion of "secondary users" in this *Notice*. FirstNet seeks comments on this preliminary conclusion.

With respect to item (B)(ii) of the definition, we preliminarily conclude that all or a portion of the FirstNet Band 14 spectrum can be allocated for secondary use by a CLA lessee because the phrase, "the spectrum allocated to such entity" does not appear to require any minimum amount of such spectrum to be allocated. This interpretation would provide FirstNet with maximum flexibility in marketing excess network capacity.

Further, according to item (B)(ii), the CLA lessee can use that spectrum to originate or terminate to or from a "long-haul" network utilized by the CLA lessee. Because the term "long-haul" network has less meaning in the context of information services, rather than regulated voice services, we preliminarily conclude that, without limitation, a "long-haul" network could be one that traverses traditional Local Access Transport Area boundaries, but other interpretations and more expansive boundaries are possible. We seek comments on this preliminary conclusion.

We also preliminarily conclude that the reference to "dark fiber" cannot literally be interpreted as such because, once transporting traffic, the fiber would no longer be "dark." Thus, FirstNet preliminarily concludes that the reference should be interpreted to allow the covered lessee to transport such traffic on otherwise previously dark fiber facilities. We seek comments on this preliminary conclusion, and on any alternative interpretations requiring the use of dark fiber of a long network, or previously unused capacity on lit fiber of a long haul network.

[88] 47 U.S.C. 1428(a)(2)(B)(i).

Given the complexity of this provision, we seek comments on both our specific preliminary conclusions above as well as the provision generally, including any alternative interpretations, the potential policy goals underlying the provision's inclusion in the Act, the ramifications of alternative interpretations to the value of CLAs, and any technical impediments to implementing the above preliminary or alternative interpretations.

3. Network Equipment and Infrastructure Fee

Section 6208(a)(3) provides for lease fees related to network equipment and infrastructure.[89] As contrasted with lease fees related to network capacity in subsection (a)(2), or user fees in subsection (a)(1), FirstNet interprets this provision as being limited to the imposition of a fee for the use of static or isolated equipment or infrastructure, such as antennas or towers, rather than for use of FirstNet spectrum or access to network capacity. We seek comments on where use under subsection (a)(1) or (a)(2) would end, and use under (a)(3) would begin for equipment such as antennas.

Section 6208(a)(3) defines the scope of eligible equipment or infrastructure for which FirstNet may charge a fee to include "*any* equipment or infrastructure, including antennas or towers, constructed or otherwise owned by [FirstNet] resulting from a public-private partnership arrangement to construct, manage, and operate the [NPSBN]."[90] We interpret "constructed or otherwise owned by [FirstNet]" as requiring that FirstNet ordered or required the construction of such equipment or infrastructure, paid for such construction, or simply owns such equipment or infrastructure. We seek comments on the above preliminary conclusions and whether this provision would also include equipment or infrastructure that FirstNet does not own but, through

[89] 47 U.S.C. 1428(a)(3).

[90] 47 U.S.C. 1428(a)(3) (emphasis added).

a contract, such as one resulting from a public-private partnership arrangement to construct, manage, and operate the NPSBN, has rights to sublease access to, or use of, such equipment or infrastructure.

III. EX PARTE COMMUNICATIONS

Any non-public oral presentation to FirstNet regarding the substance of this *Notice* will be considered an *ex parte* presentation, and the substance of the meeting will be placed on the public record and become part of this docket. No later than two (2) business days after an oral presentation or meeting, an interested party must submit a memorandum to FirstNet summarizing the substance of the communication. Any written presentation provided in support of the oral communication or meeting will also be placed on the public record and become part of this docket. Such *ex parte* communications must be submitted to this docket as provided in the ADDRESSES section above and clearly labeled as an *ex parte* presentation. Federal entities are not subject to these procedures.

Dated: September 17, 2014.

Stuart Kupinsky,

Chief Counsel, First Responder Network Authority.

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